IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

MINNIE KEYES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINION BELOW.

There was no memorandum opinion of the District Court. The decision of the United States Court of Appeals for the District of Columbia (R. 5259) is not yet reported except in 69 W. L. R. 390.

II. JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on March 10, 1941. No petition for re-hearing was filed, but petitioner made application for a stay of mandate, and on April 2, 1941, the said Court entered an order staying the issuance of a mandate for a period of thirty days (R. 60); and on May 9, 1941,

entered a further order staying the issuance of a mandate to and including June 8, 1941.

The jurisdiction of this Court is invoked pursuant to the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Paragraph (c) of Section 5, of Rule 38 of this court.

III. STATEMENT OF THE CASE.

The case has been fully stated under the heading "Statement of the Matter Involved" on pages 2 to 3, inclusive of the Petition for a Writ of Certiorari, which is hereby adopted and incorporated herein by reference.

IV. SPECIFICATION OF ERRORS.

The United States Court of Appeals for the District of Columbia erred:

1. In affirming the order entered herein by the District Court on May 23, 1940.

2. In granting the prayers of the petition for condemnation filed herein as against petitioner.

3. In making the rule to show cause returnable herein on May 10, 1940, absolute, and in requiring and directing the petitioner to forthwith surrender possession of her property here involved to the United States of America.

4. In holding that the allegations of the petitioner's answer to the petition for condemnation herein and to said rule to show cause were insufficient as a matter of law.

5. In holding that the petitioner's answer to said petition for condemnation and her answer to said rule to show cause do not raise any genuine issues of fact.

6. In holding that there is any statutory justification for the condemnation of petitioner's property here involved under the District of Columbia Alley Dwelling Act.

7. In refusing to hold that the aforesaid act is unconstitutional and void in that it authorizes the condemnation of private property for other than public use.

8. In not holding that the acquisition of petitioner's property here involved for a low rent housing project does not constitute a public use and that the operation of the housing project to be erected thereon by the Alley Dwelling Authority to the class of people contemplated does not constitute "a public use".

9. In not holding that the respondent is without power to exercise the right of eminent domain for the purpose of acquiring privately owned property for low rent housing projects.

V. SUMMARY OF ARGUMENT.

Point A—Petitioner's property not situated in alley or within a square containing an inhabited alley and cannot be condemned under District of Columbia Alley Dwelling Act.

Point B—Respondent cannot condemn petitioner's property for the purpose of constructing, operating, and maintaining a low rent housing project.

Point C—Petitioner can attack validity of District of Columbia Alley Dwelling Act by showing either that the declaration or existence of facts on which its validity depends was arrived at through error or mistake or in any event no longer obtain.

Point D—Petitioner clearly entitled to offer evidence in support of her answer.

Point E—The District of Columbia Alley Dwelling Act is void and unconstitutional in that it authorizes the condemnation of private property for other than public use.

VI. ARGUMENT.

Point A.—Petitioners' Property Not Situated in An Alley or Within a Square Containing an Inhabited Alley and Cannot be Condemned Under District of Columbia Alley Dwelling Act.

It is clear from a mere reading of the District of Columbia Alley Dwelling Act that it was the primary intention of Congress to discontinue the use of buildings in alleys as dwellings for human habitation; and to replat and develop squares containing inhabited alleys, in the interest of public health, safety, morals and welfare; and secondly, to provide decent, safe, adequate and sanitary housing accommodations for persons or families substantially equal in number to those who are to be deprived of habitation by reason of the demolition of buildings in the administration of the Act.

This is the plain and natural interpretation which must be placed upon the Act because, after reciting certain declarations of legislative determination, and the evils which the Legislature intended to correct, it is provided that in order to remedy the conditions and evils as recited and to carry out the policy as declared, the President is authorized and empowered to acquire by purchase, gift, condemnation, or otherwise (1) any property situated in or adjacent to an inhabited alley; (2) any property within any square containing an inhabited alley, the acquisition of which is reasonably necessary for utilization by replatting, improvement, or otherwise, pursuant to the provisions of the Act; and (3) any property that may be necessary to provide decent, safe, adequate, and sanitary housing accommodations for persons or families substantially equal in number to those who are to be deprived of habitation by reason of the demolition of buildings pursuant to the administration of the Act. This would seem so palpably plain as to admit of no argument.

In her answer filed herein petitioner alleges, and it is not denied, that her said property is not situated in or adjacent to any inhabited alley. (R. 39) She further alleges, and it likewise is not denied, that her said property is not within a square containing an inhabited alley. (R. 39) She further alleges that the acquisition of her property herein sought is unnecessary in order to provide decent, safe, adequate, and sanitary housing accommodations for persons who are to be deprived of habitation by reason of the instant condemnation proceeding. (R. 39, 40) How then, on the basis of the present record, can it be urged with any degree of logic that there is any statutory justification for the condemnation of petitioner's property under Title I of the act. The answer would seem quite clear that there is none.

Point B.—Respondent Cannot Condemn Petitioner's Property for the Purpose of Constructing, Operating, and Maintaining a Low Rent Housing Project.

The lower court's decision is buttressed upon the proposition that respondent is proceeding under Title II of the Act, which provides in substance that in addition to its other powers the Authority designated by the President for the purpose of the administration of the Act shall have the power to acquire sites for and to prepare, carry out, acquire, lease, and operate housing projects as defined in said Act, and to construct or provide for the construction, improvement, and the like, of any such housing project in the District of Columbia. The Act itself defines "housing project" to mean any low rent housing as defined in the United States Housing Act of 1937, c. 8, Title 42, U. S. Code. The United States Housing Act of 1937, after declaring it to be the policy of the United States to promote the general welfare of the nation, by employing its funds and credit as provided in said Act, to alleviate present and recurring unemployment and to remedy the unsafe and

insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, then proceeds to define low rent housing and prescribe means whereby loans or contributions may be made for the realization of the same.

It provides among other things that the authority appointed for the purpose of the administration of the Act may make loans to public housing agencies to assist the development, acquisition, or administration of low rent housing or slum clearance projects by such agencies. It further provides that the authority may make either annual contributions to public housing agencies or, as an alternative method of assistance, may make capital grants. Significantly, however, it provides that no capital grant for the development of any low rent housing or slum clearance project involving the *construction of new dwellings* may be made unless the project includes the *elimination* by demolition, condemnation, and effective closing, or the compulsory repair or improvement of *unsafe or insanitary dwellings* situated in the locality or metropolitan area substantially *equal in number* to the number of newly constructed dwelling units provided by the project. It does provide that such elimination may, in the discretion of the authority, be deferred where the shortage of decent, safe, or sanitary housing available to families of low income is so acute as to force dangerous over-crowding of such families.

As shown by paragraph three of the petition for condemnation (R. 5, 6) the United States Housing Authority entered into a contract with the District of Columbia Alley Dwelling Authority by which it has agreed to lend the Alley Dwelling Authority the sum of $6,600,000 for the acquisition of sites for the construction, operation, and management of low rent housing projects in the District of Columbia. Hence it is without dispute that the low rent housing project as herein contemplated involves the construction of new dwellings. The difficulty is, however, that

there is no showing made by respondent that the other statutory requirements have been met. *There is no showing that petitioner's property is either unsafe or unsanitary.* There is no showing that elimination of unsafe and insanitary dwellings located in the District of Columbia substantially *equal in number* to the number of newly constructed dwelling units will result from the construction of the proposed low rent housing project.

As shown by paragraph twelve of her answer (R. 39) petitioner's property is improved by a two story brick house, having both gas and electricity. The lot on which the house is built contains 1,525 square feet. The house has a frontage of seventeen feet and there are one hundred three feet from the front of the house to the rear of the lot. The property is located at approximately the middle of the block on L Street and extends back to a vacant or unoccupied piece of ground which has never been graded to the street level. It is a desirable property and petitioner has enjoyed a good rental experience. Considering the record as a whole, therefore, it would seem that these allegations contained in petitioner's answer clearly negative the idea of a finding that her house is either unsafe or insanitary. Hence, the petition cannot properly serve as a basis for this proceeding.

In its opinion the United States Court of Appeals for the District of Columbia held in effect that Title II of the Act vested in the Authority power to condemn sites for low cost housing projects in addition to and wholly independent of the provisions of Title I of the Act; that moreover the acquisition of the property is to be made with the proceeds of a loan to be granted by the United States Housing Authority under Section 9 of the Act, which imposes no condition that there be the demolition of an equivalent number of unsafe or insanitary dwellings. The fallacy of the Court's opinion in this regard is readily apparent because Sections 9, 10 and 11 of the Act are all related; and it would seem clear that the type of loans referred to in Sec-

tion 9 of the Act are merely amplified in Sections 10 and 11. Hence the requirement that there be a demolition of an equivalent number of unsafe or insanitary dwellings as a condition to the granting of the subsidies under Sections 10 and 11 must be met. But there is no showing according to this record that such requirements have been complied with. Aside and apart from this consideration it is equally apparent that the Court has erroneously construed Section 202 of Title II of the District of Columbia Alley Dwelling Act. Such provision does not give the authority power to condemn privately owned property irrespective of where located or the value thereof. Reading the Act in its entirety and construing all of the provisions together, it would seem clear that the primary intention of Congress was the elimination of slums and alley dwellings in the interest of public health and morals. Unless it can be said, therefore, that a property is a slum property or is unsafe and insanitary there is no statutory justification for the condemnation of petitioner's property.

Point C.—Petitioner Can Attack Validity of District of Columbia Alley Dwelling Act by Showing Either that the Declaration or Existence of Facts on Which Its Validity Depends Were Arrived at Through Mistake or Error or in Any Event No Longer Obtain.

In petitioner's answer a direct challenge is made upon the validity of the District of Columbia Alley Dwelling Act on which respondent relies as the basis of this proceeding. (R. 38) In the Act Congress has found and determined that the use of buildings in alleys as dwellings for human habitation is injurious to the public health, safety, morals and welfare. It is then declared to be the policy of the United States to protect and to promote the welfare of the inhabitants of the District of Columbia by eliminating all such injurious conditions, and it further recites that since control by regulatory processes have proved inadequate and insufficient to remedy the evils, it is in the judgment of Congress

necessary to acquire property in the District of Columbia to effectuate the declared policy by the discontinuance of the use for human habitation in the District of Columbia of buildings in alleys and thereby to eliminate the communities in the inhabited alleys in said District, and to provide decent, safe, adequate and sanitary habitations for persons or families who would be deprived of habitation by reason of the demolition of buildings under the Act.

Petitioner alleges in her answer that the conditions existing in the District of Columbia with respect to the use of buildings in alleys as dwellings for human habitation were not injurious to the public health, safety, morals, and welfare at the time of the enactment of said Act; alleges further that the policy of the United States to protect and promote the welfare of the inhabitants of said District as recited in said Act was arrived at by mistake or error; alleges further that even if true at the time of the enactment of the Act the existence of the state of facts as recited by Congress have ceased to operate. She therefore contends that the Act, even if valid at the time of its enactment, has been rendered invalid by change of circumstances.

We are not unmindful of the rule that great respect is due to the declaration of the Legislature in matters of this kind in so far as they relate to present facts. Even so, a Court is not at liberty to refuse, as did the lower court, to inquire into the facts and circumstances surrounding the legislative determination when the validity of the law depends upon the truth of what is declared.

> *Block* v. *Hirsh*, 256 U. S. 135; 65 L. ed. 865,
> *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; 67 L. ed. 1103,
> *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543; 68 L. ed. 841.

Then, too, a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed.

Perrin v. *U. S.*, 232 U. S. 478; 58 L. ed. 691,
Missouri v. *Chicago B. & Q. R. Co.*, 241 U. S. 533; 60 L. ed. 1148,
Newton v. *Consolidated Gas Co.*, 258 U. S. 165; 66 L. ed. 538,
Chastleton Corporation v. *Sinclair, supra.*

In *South Carolina State Highway Department* v. *Barnwell Brothers*, 303 U. S. 177; 82 L. ed. 734, this Court held that in reviewing a decision sustaining the validity of a regulatory statute, the Court examines the *whole record* in order to ascertain whether it is possible to see that the legislative choice is without rational basis, not merely to see if the findings of the Court below are supported by evidence, said in part as follows:

> "Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the *weight of evidence* presented in Court appears to favor a different statute. * * * Hence, in reviewing the present determination we examine the record, not to see whether the findings of the Court below are supported by evidence, but to ascertain upon the *whole record* whether it is possible to say that the legislative choice is without rational basis. * * * Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment." (Italics supplied)

It will be readily apparent from that case that the party who challenged the validity of the statute had an opportunity to present evidence in support of his contentions. Here petitioner was denied this right. Unless the plain allegations of her answer challenging the validity of the Act are to be ignored, as was done in the lower court, certainly it cannot be said that this record supports the legislative judgment. The only conclusion which can be reached on this record is that the legislative choice is without rational basis,

giving to petitioner's allegations in her answer attacking the Act, the merit and consideration that the circumstances warrant.

Point D.—Petitioner Clearly Entitled to Offer Evidence in Support of Her Answer.

In petitioner's answer she denies certain of the material allegations contained in the petition for condemnation, thereby raising genuine issues of fact. Under Title 25, c. 5, Sec. 100, 1929 D. C. Code, which section is invoked by respondent herein for jurisdictional purposes, it is provided that the lower court shall have full power to hear and determine *all issues of law and fact*. Under Sec. 106 of the same title it is provided in substance that if a party should fail to appear after due notice of the condemnation proceeding, he shall be deemed to have consented to the taking and condemnation of his land and shall be bound by all orders, judgments and decrees that may be entered in the proceeding.

Here, petitioner did appear and answer. Not only did she attack the constitutionality of the Act in question, but she likewise challenged its validity based upon allegations of fact, all in addition to raising genuine issues of fact by her denial of certain of the material allegations contained in said petition.

Clearly then the lower court in holding that petitioner's answer was insufficient as a mater of law and in denying her the opportunity to introduce evidence in support of her answer, has denied to her the constitutional privilege which she has of having a full hearing in the true sense of the word. By the Court's action she has been denied due process of law as secured to her under the Constitution.

In *Gilbert* v. *Sargent*, 57 App. D. C. 207, 19 F. (2d) 681, this Court held that in a suit to enjoin enforcement of certain orders of the Rent Commission the lower court committed error in excluding evidence of unreasonableness of rates, and that emergency validating the Food Control and the District of Columbia Rents Act had passed. This Court said in part as follows:

> "It follows accordingly that the plaintiff below was entitled to bring his suit in equity and therefore entitled to submit evidence showing that the rentals fixed by the Commission were unfair, unreasonable and confiscatory. The rejection of such evidence was error. Similarly the plaintiff was entitled to submit evidence to show that the emergency which existed at the passage of the original Act * * * had ceased prior to June 1, 1923, up to which time the lower court entered its decree for defendants for all excess payments made by them over the rates fixed by the Rent Commission."

In its decision the United States Court of Appeals for the District of Columbia has failed to give a proper interpretation to the decision of this court in *Pacific States Co.* v. *White*, 296 U. S. 176, 185. In that case the only requirement where legislative action is challenged is that the facts relied upon to rebut the presumption of constitutionality must be specifically set forth. It will be readily apparent from a cursory examination of petitioner's answer filed herein that the ultimate facts upon which she relies in support of her attack made on the Act that the declaration or existence of facts on which it depends were arrived at through mistake or error, or in any event no longer obtain, have been fully set forth. She was not required to plead her evidence.

Point E.—The District of Columbia Alley Dwelling Act is Void and Unconstitutional in that it Authorizes the Condemnation of Private Property for Other Than Public Use.

There is no constitutional provision expressly authorizing the Federal Government to exercise the power of eminent domain. It is nevertheless settled that this power belongs to the Federal Government as an attribute to its sovereignty.

> *Kohl* v. *U. S.*, 91 U. S. 367; 23 L. ed. 449,
> *Shoemaker* v. *U. S.*, 147 U. S. 282; 37 L. ed. 170.

Of more importance, however, is the fact that the right of eminent domain can only be exercised where the property is to be taken for a public use. Courts as a rule have adopted no judicial definition of a "public" as distinguished from a "private" purpose, and have left each case to be determined by its own peculiar circumstances. In the District of Columbia Alley Dwelling Act Congress apparently proceeded in the exercise of its police power over the District of Columbia. This would seem to necessarily follow because the provision for the compensated taking of alley property is preceded by an express declaration that it is done in the interest of the public health, safety, morals and welfare. Subject only to those prohibitions of the Constitution which act directly or by implication upon the Federal Government Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end.

Granting that all prior decisions dealing with condemnation proceedings are to be considered in the light of the powers possessed by the sovereign seeking to exercise the right, nevertheless it is submitted that the Federal Government cannot on the present record condemn Petitioner's property for the purpose of constructing a low cost housing project. This, in the essence, is what this case comes down to. If such a result as would obtain from the administration of the Act in question may be properly considered a public use then there is absolutely no limitation upon the power of the Federal Government to condemn any private property. In other words, it could condemn any private property which it could employ to an advantage to the public or a small portion thereof.

The taking of petitioner's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment as set forth in the National Housing Act of 1937 cannot properly be said to be within the scope of the powers of the Federal Government.

Of particular pertinence here is the case of the *United States* v. *Certain Lands in the City of Louisville*, 78 F. (2d) 684, cert. granted 296 U. S. 567, dism'd 297 U. S. 726. In that case the Court held that the National Industrial Recovery Act, so far as it attempted to authorize the National Government to condemn private property for low cost housing and slum clearance projects and for the purpose of reducing unemployment was unconstitutional since such use was not a public use. The opinion of the Court is in part as follows:

> " * * * Thus in these and other cases involving state action the court dealt with the subject of public use as it pertained to the powers of the sovereign claiming the right to take. It must be similarly dealt with in the case at bar. As so considered with reference to the federal government, it does not, in our opinion, include the relief of unemployment as an end in itself or the construction of sanitary houses to sell or lease to low-salaried workers or residents of slum districts. The tearing down of the old buildings and the construction of new ones on the land here sought to be taken would create, it is true, a new resource for the employment of labor and capital. It is likewise true that the erection of new sanitary dwellings upon the property and the leasing or the selling of them at low prices would enable many residents of the community to improve their living conditions. It may be, too, that these group benefits, so far as they might affect the general public, would be beneficial. If, however, such a result thus attained is to be considered a public use for which the government may condemn private property, there would seem to be no reason why it could not condemn any private property which it could employ to an advantage to the public. There are perhaps many properties that the government could use for the benefit of selected groups. It might be, indeed, that by acquiring large sections of the farming parts of the country and leasing the land or selling it at low prices it could advance the interest of many citizens of the country, or that it could take over factories and other businesses and operate them upon plans more beneficial to the employees or the public, or even oper-

ate or sell them at a profit to the government to the relief of the taxpayers. The public interest that would thus be served, however, cannot, we think, be held to be a public use for which the government, in the exercise of its governmental functions, can take private property. The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not, in our opinion, within the scope of the powers of the federal government."

The reasoning of the above decision appears to be sound and unanswerable. It will not suffice for the Court in its opinion to attempt to distinguish this case from the case at bar on the theory that Congress by virtue of its plenary powers over the District of Columbia can nevertheless pass an act the operative effect of which is to confiscate petitioner's property. The undisputable facts are that the act as applied to petitioner's property is unconstitutional and void because it amounts to the taking of privately owned property for other than a public use. Her position in this regard is fortified by the fact that her property is not an alley property, nor is it in close proximity to any inhabited alley. It is not the unsafe, insanitary, or obnoxious type of property which Congress had in mind at the time of the enactment of the Act. Accordingly, to permit the decision of the United States Court of Appeals for the District of Columbia to stand would be giving to the Act an interpretation which the Congress never intended. While it is true that the opinion finds some support in the case cited in the decision of *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 F. (2d) 246, that decision was never reviewed by this Court and would seem to be at complete variance with other prior decisions of this Court.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted and this Honorable Court should review the decision of the United States Court of Appeals for the District of Columbia in this case, and finally reverse it.

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